In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-636

MICHAEL PELLICCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Solicitor General, as Acting Attorney General, was not empowered under 18 U.S.C. 2516(1) to authorize applications for wire interceptions, and that his delegation of authority to an Assistant Attorney General pursuant to that statute was improperly worded and void.

After a jury waived trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conducting an illegal gambling enterprise, in violation of 18 U.S.C. 1955. He was sentenced to five years' imprisonment and fined $20,000. The court of appeals affirmed *per curiam* (Pet. App. A).

Much of the government's evidence at trial consisted of conversations intercepted and recorded pursuant to court orders issued under authority of 18 U.S.C. 2510, *et seq.* The procedures employed by the government in securing court approval for these wire interceptions were as follows:

On November 27, 1973, Joel M. Friedman, a special attorney of the Department of Justice, filed in the United States District Court for the District of Massachusetts an application seeking authority to intercept conversations of appellant and others (C.A. App. 19-22).[1] Within the application it was stated that " * * * the Acting Attorney General of the United States, the Honorable Robert H. Bork, has specially designated the Assistant Attorney General in charge of the Criminal Division, the Honorable Henry E. Petersen * * * to authorize this application" and that pursuant to the delegation the Assistant Attorney General had authorized the application (C.A. App. 19).[2]

Attached to the application was a copy of the order of Mr. Bork, dated October 23, 1973, in which as Acting Attorney General, he designated "the Assistant Attorney

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[1]"C.A. App." refers to the Appendix filed in the court of appeals, a copy of which we are lodging with the Clerk.

[2]Solicitor General Bork had become Acting Attorney General on October 20, 1973, upon the resignation of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus. Petitioner does not contest that Mr. Bork was the legally designated Acting Attorney General at all times relevant to the authorization (Pet. 8).

Under 18 U.S.C. 2518(1)(a), each application for a wire interception order must include "the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application."

General in charge of the Criminal Division to exercise the power conferred by Section 2516 of Title 18, United States Code, to authorize applications to a federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications * * * " (C.A. App. 23). Also attached was a memorandum of November 27, 1973, from Mr. Henry E. Petersen in which he, as Assistant Attorney General in charge of the Criminal Division, authorized the special attorney's application to the district court (C.A. App. 24).

On November 27, 1973, upon the basis of this application, the district court approved the government's request to intercept conversations on petitioner's telephone. On December 17, 1973, the government applied for and the district court authorized a renewal of the wire interception order (see Pet. App. A, p. 14; C.A. App. 45-49).

1. Petitioner first argues (Pet. 6-9) that under 18 U.S.C. 2516(1)[3] an Acting Attorney General is not empowered to authorize applications for wire interceptions or, as in the instant case, to delegate that responsibility to an Assistant Attorney General. While petitioner correctly perceives that Congress, in Section 2516(1), intended to confine wire interception authority to "politically responsive" individuals within the Justice Department (see

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[3]18 U.S.C. 2516(1) provides in pertinent part:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant * * * an order authorizing or approving the interception of wire or oral communications * * *.

United States v. *Giordano*, 416 U.S. 505), the Solicitor General, as Acting Attorney General, is clearly within that category. Section 2516(1) must be read with 28 U.S.C. 508, which provides that when neither the Attorney General nor Deputy Attorney General are avilable, "the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, *shall act as Attorney General*" (emphasis added).[4] Congress's purpose in establishing this provision was to avoid the kind of gap in the ability of the government to act that petitioner would create. See H. Rep. No. 901, 89th Cong., 1st Sess., p. 184; S. Rep. No. 1380, 89th Cong., 2d Sess., p. 203; see also *United States* v. *Curreri*, 363 F. Supp. 430 (D. Md.), and *United States* v. *Lucido*, 373 F. Supp. 1142 (E.D. Mich.), upholding the authority of an Acting Attorney General to authorize wire interception applications.

Moreover, the Solicitor General as well as the Attorney General, Deputy Attorney General, and Assistant Attorneys General, is appointed by the President and is subject to confirmation by the Senate. See 28 U.S.C. 503, 504, 505 and 506. These statutory provisions establish no lesser criteria for the Solicitor General than the Attorney General or Deputy Attorney General, and in reality, petitioner's suggestion that Mr. Bork's confirmation as Solicitor General "* * * was far removed from the kind of examination he would undergo as a nominee for

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[4]The prescribed order of succession is provided in 28 C.F.R. 0.132, which at the time in question, provided that "[i]n case of vacancy in both the office of Attorney General and the office of Deputy Attorney General, the Solicitor General shall perform the functions and duties of and act as Attorney General."

Attorney General * * *" (Pet. 8) is neither necessarily true, nor in any event relevant. Given the Solictor General's pre-eminent role in government litigation (see 28 C.F.R. 0.20) and the possibility of his acting as Attorney General under 28 U.S.C. 508, the Senate can be expected to scrutinize any nominee for that position at least as carefully as it would consider nominees for the positions of Assistant Attorneys General, who under Section 2516(1) may be designated to authorize wire interception orders.

Petitioner also argues that a differing phraseology between 28 U.S.C. 508(a) and (b) indicates a congressional intent that a Solicitor General acting as Attorney General enjoys less power than would a Deputy Attorney General acting in the same capacity (Pet. 9-10). Section 508(a) provides "* * * the Deputy Attorney General may exercise all the duties of that office * * *," and Section 508(b) provides "* * * the Solicitor General * * * shall act as Attorney General." The difference is merely stylistic, with the fuller statement in the first section. In terms of sound policy, petitioner's contention is untenable, for, as the court below noted, "* * * if accepted, it would place this court in the impossible position of trying to determine which powers Bork succeeded to and which he did not" (Pet. App. A, p. 16). See also the legislative history cited at p. 4, *supra*.

2. In his second and third arguments (Pet. 10-13), petitioner contends that the delegation of authority by Mr. Bork ("I hereby specially designate the Assistant Attorney General in charge of the Criminal division * * * to authorize applications * * *") was improper because it did not authorize the Assistant Attorney General of the Criminal Division by name, but only by title. Section 2516, however, specifies that the Attorney General may designate "any Assistant Attorney General"

and includes no requirement that such designation be made only by proper name. The designation of "the Assistant Attorney General in charge of the Criminal Division" left no doubt as to the person thus empowered to authorize wire interceptions, as only Henry E. Petersen had been appointed by the President to that position. Moreover, Mr. Petersen's letter authorizing the wire interception was signed

Henry E. Petersen
Assistant Attorney General
Criminal Division

leaving no doubt as to the name of the individual responsible for the authorization.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.